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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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12 CORNELIO CALAYAG,

13 Plaintiff,

CIV S-05-0086 LKK PAN PS

14 v.

15 JOHN E. POTTER, POSTMASTER
16 GENERAL, UNITED STATES POSTAL
SERVICE,

ORDER

17 Defendant.
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19 Defendant moves to dismiss plaintiff's complaint for
20 failure to state a claim upon which relief can be granted. Fed.
21 R. Civ. P. 12(b)(6). As oral argument was unnecessary to resolve
22 this matter, I vacated the hearing scheduled for October 19,
23 2005, and issue this order.

24 Plaintiff has filed neither an opposition nor statement
25 of nonopposition to defendant's motion. E. D. Cal. L. R. 78-
26 230(c).

1 Plaintiff filed this action January 14, 2005, alleging
2 employment discrimination under Title VII of the Civil Rights
3 Act, 42 U.S.C. §§ 2000e et seq. Plaintiff is an employee of the
4 U.S. Postal Service Processing and Distribution Center in
5 Oakland, California.¹ He states he received a notice of removal
6 July 2002 based on allegations he had submitted false medical
7 documentation and made improper requests for leave; he was
8 reinstated November 2002. The following year, on December 15,
9 2003, plaintiff's supervisor summoned plaintiff to her office
10 and, in front of another, accused plaintiff of improper
11 attendance and sick leave use for December 3, 4, 5, 8, and 9,
12 2003. On January 15, 2004, plaintiff filed an administrative
13 complaint alleging "continuing and systemic" "unlawful
14 discrimination based upon my age (DOB 1944), disabilities
15 (stress, high blood pressure, diabetes), race (Philippine),
16 National Origin (Philippines), and other acts made unlawful by the
17 Civil Rights Act of 1964 as amended." Mediation April 2004
18 failed to resolve plaintiff's claim and he filed a formal
19 complaint May 4, 2004, with the Equal Employment Opportunity
20 Commission (EEOC). On October 26, 2004, the EEOC affirmed the
21 dismissal of plaintiff's administrative complaint, reasoning
22 "that the complaint fails to state a claim under the EEOC
23 regulations because complainant failed to show that he suffered
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25 ¹ Defendant states its intent to transfer venue of this action to the
26 U.S. District Court for the Northern District of California. See Defendant's
Memorandum in Support of the Motion to Dismiss, fn. 1.

1 harm or loss with respect to a term, condition, or privilege of
2 employment for which there is a remedy." Plaintiff filed this
3 action within 90 days after the EEOC's decision affirming
4 dismissal of plaintiff's administrative complaint. See 42 U.S.C.
5 § 2000e-5(f)(1).

6 On a motion to dismiss pursuant to Fed. R. Civ. P.
7 12(b)(6), the court must accept plaintiff's allegations as true,
8 read the complaint most favorably to plaintiff, give plaintiff
9 the benefit of every reasonable inference that appears from the
10 pleading and argument of the case and dismiss the complaint only
11 if it is clear that no relief could be granted under any set of
12 facts that could be proved consistent with the allegations.
13 Wheeldin v. Wheeler, 373 U.S. 647, 658 (1963); Retail Clerks
14 International Association, Local 1625, AFL-CIO v. Schermerhorn,
15 373 U.S. 746, 754, n. 6 (1963); Hishon v. King & Spalding, 467
16 U.S. 69, 73 (1984). The court may dismiss a complaint if it does
17 not contain "either direct or inferential allegations respecting
18 all the material elements" of each claim or if the allegations
19 are merely "bare assertions of legal conclusions." Tahfs v.
20 Proctor, 316 F.3d 584, 590 (6th Cir. 2003) (internal quotations
21 omitted).

22 The court may consider documents attached to the
23 complaint in evaluating a motion to dismiss. Parks School of
24 Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

25 "Under McDonnell Douglas [v. Green, 411 U.S. 792, 802
26 (1973)], a plaintiff alleging disparate treatment under Title VII

1 must first establish a prima facie case of discrimination.
2 Specifically, the plaintiff must show that (1) he belongs to a
3 protected class; (2) he was qualified for the position; (3) he
4 was subject to an adverse employment action; and (4) similarly
5 situated individuals outside his protected class were treated
6 more favorably. The burden of production, but not persuasion,
7 then shifts to the employer to articulate some legitimate,
8 nondiscriminatory reason for the challenged action. If the
9 employer does so, the plaintiff must show that the articulated
10 reason is pretextual 'either directly by persuading the court
11 that a discriminatory reason more likely motivated the employer
12 or indirectly by showing that the employer's proffered
13 explanation is unworthy of credence.' Texas Dep't of Community
14 Affairs v. Burdine, 450 U.S. 248, 256 (1981)." Chuang v.
15 University of California Davis, Bd. of Trustees, 225 F.3d 1115,
16 1123-1124 (9th Cir. 2000).

17 An "adverse employment action" is a "non-trivial
18 employment action[] that would deter reasonable employees from
19 complaining about Title VII violations" or engaging in protected
20 activity. Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th
21 Cir. 2000). A "hostile work environment" is demonstrated by
22 proof of unwelcome verbal or physical conduct of a harassing
23 nature that is sufficiently severe or pervasive to alter the
24 conditions of employment. Pavon v. Swift Transportation Co.,
25 Inc., 192 F.3d 902, 908 (9th Cir.1999). A hostile work
26 environment claim is composed of a series of separate abusive

1 acts that collectively constitute one unlawful employment
2 practice. In determining whether an actionable hostile work
3 environment claim exists, the court must look to all the
4 circumstances, including the nature, severity and frequency of
5 the discriminatory conduct, and whether it unreasonably
6 interferes with an employee's work performance. 42 U.S.C. §
7 2000e-5(e)(1). Provided that an act contributing to the claim
8 occurs within the filing period, the entire time period of the
9 hostile environment may be considered by a court for the purposes
10 of determining liability. National R.R. Passenger Corp. v.
11 Morgan, 536 U.S. 101, 116-117 (2002), quoting Harris v. Forklift
12 Systems, Inc., 510 U.S. 17, 23 (1993)).

13 While it is not disputed plaintiff belongs to one or more
14 protected classes and is qualified for his position, the facts
15 plaintiff did plead do not support a claim based upon an adverse
16 employment action or hostile work environment and plaintiff has
17 not alleged that similarly situated persons were treated more
18 favorably.

19 While plaintiff's complaint generally asserts multiple
20 instances of "prohibited personnel practices, violation of my
21 Constitutional and Civil rights, letters of warning, disciplinary
22 action, other unfavorable actions, and other unlawful acts," it
23 specifically identifies only his removal July 2002 and
24 questioning by his supervisor December 2003. An employer's
25 formal inquiry into an employee's use of sick leave is on its
26 face inherently reasonable and cannot be said to interfere with a

1 regular employee's normal work activities. Cf., e.g., Ray v.
2 Henderson, 217 F.3d 1234, 1243 -1244 (9th Cir. 2000) ("adverse
3 employment actions" include employer's selective reduction of
4 workload and pay). Plaintiff's limited examples and his failure
5 to identify more favorable treatment of similarly situated
6 employees demonstrate neither an actionable adverse employment
7 action nor a hostile work environment.

8 Accordingly, plaintiff's complaint is dismissed for
9 failure to state a prima facie case of discrimination under Title
10 VII.

11 However, giving plaintiff every benefit of the doubt, as
12 we must for pro se litigants, Haines v. Kerner, 404 U.S. 519, 520
13 (1972), Abassi v. I.N.S., 305 F.3d 1028, 1032 (9th Cir. 2002),
14 plaintiff is granted leave to serve and file an amended complaint
15 within twenty (20) days of service of this order that sets forth
16 all specific instances (not generalizations) of allegedly adverse
17 and disparate employment actions. Failure to file an amended
18 complaint or failure again to state a claim for which relief may
19 be granted shall result in a recommendation this case be
20 dismissed.

21 So ordered.

22 Dated: November 30, 2005.

23 /s/ Peter A. Nowinski
24 PETER A. NOWINSKI
25 Magistrate Judge
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